Tan Sri Abdul Rahim bin Datuk Thamby Chik v John Marcom & Ors (No 2)

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S4–23–51 OF 1998
RAHMAH HUSSAIN J
25 OCTOBER 1999

Civil Procedure *— Jurisdiction — High Court — Writ served on defendant in Malaysia — Whether conferred jurisdiction on High Court of Malaya — Rules of the High Court 1980 O 11 r 1 — Courts of Judicature Act 1964 s 23(2)*

Tort *— Defamation — Libel — Civil jurisdiction of the High Court — Defamatory article written outside Malaysia — Publication containing article circulated in Malaysia — Whether cause of action arose in Malaysia*

The plaintiff sued the defendants for libel for an article published in *The TIME Magazine*. The fourth defendant did not dispute that the article was written by him. He applied to set aside the writ of summons against him claiming that pursuant to s 23(1)(a) of the Courts of Judicature Act 1964 ('the CJA'), the court had no jurisdiction over him as the cause of action did not arise in Malaysia as he wrote the article in Jakarta, Indonesia and sent a draft of it to Hong Kong. He also contended that the mere service of the writ on him while he was in Malaysia, did not automatically confer jurisdiction on the High Court of Malaya. His application was dismissed by the senior assistant registrar and he appealed to the judge.

Held, dismissing the fourth defendant's appeal with costs:

(1) Service alone pursuant to O 11 r 1 of the Rules of the High Court 1980 was not the sole basis of jurisdiction as s 23(2) of the CJA conferred extra-territorial accreditation to the High Court. The position in respect of the High Court prior to Malaysia Day was that the service upon a defendant present in Malaysia was sufficient to confer jurisdiction on the High Court. After Malaysia Day, by virtue of s 23(2) of the CJA, the High Court continued to exercise its jurisdiction over those served with proceedings whilst they were in Malaysia even if their presence was temporary in nature (see pp 194F–195G); *American Express Bank Ltd v Mohamed Toufic Al-Ozeir & Anor* [1995] 1 MLJ 160 and *Malayan Banking Bhd v International Tin Council and another appeal* [1989] 3 MLJ 286 followed.

(2) The cause of action for the tort of defamation was committed where the defamatory publication was read, seen or heard. The fourth defendant as the author of the article was thus liable for its publication on the basis of the principles of joint publication and/or authorized repetition. The cause of action in respect of the fourth defendant arose in Malaysia because the article was written by him with the intention and knowledge that it would be published in Malaysia. Further, the fourth defendant did not

challenge the averments in the plaintiff's statement of claim that the article written by him was published in Malaysia and that he knew and intended the article to be published in Malaysia (see p 195G–H).

[Bahasa Malaysia summary

Plaintif telah menyaman defendan-defendan untuk libel bagi suatu rencana yang diterbitkan di dalam *The TIME Magazine*. Defendan keempat tidak mempertikaikan bahawa rencana telah ditulis olehnya. Beliau memohon untuk mengetepikan writ saman terhadapnya dengan mendakwa bahawa menurut s 23(1)(a) Akta Mahkamah Kehakiman 1964 ('AMK'), mahkamah tiada bidang kuasa ke atasnya kerana kausa tindakan tidak timbul di Malaysia oleh kerana beliau menulis rencana tersebut di Jakarta, Indonesia dan telah menhantar deraf tersebut ke Hong Kong. Beliau juga menegaskan bahawa penyerahan writ kepadanya semat-mata semasa beliau berada di Malaysia, tidak secara automatik memberikan bidang kuasa kepada Mahkamah Tinggi Malaya. Permohonannya telah ditolakkan oleh penolong kanan pendaftar dan beliau merayu kepada hakim tersebut.

Diputuskan, menolak rayuan defendan keempat dengan kos:

(1) Penyerahan sahaja menurut A 11 k 1 Kaedah-Kaedah Mahkamah Tinggi 1980 bukanlah dasar tunggal bidang kuasa oleh kerana s 23(2) AMK telah memberikan kuasa pentauliahan wilayah yang lebih kepada Mahkamah Tinggi. Kedudukan berkenaan dengan Mahkamah Tinggi sebelum Hari Malaysia adalah bahawa penyampaian ke atas defendan yang hadir di Malaysia adalah mencukupi untuk memberikan bidang kuasa Mhakamah Tinggi. Selepas Hari Malaysia, menurut s 23(2) AMK, Mahkamah Tinggi terus melaksanakan bidang kuasanya ke atas mereka yang disampaikan dengan prosiding pada masa mereka berada di Malaysia walaupun kehadiran mereka adalah berbentuk sementara (lihat ms 194F–195G); *American Express Bank Ltd v Mohamed Toufic Al-Ozeir & Anor* [1995] 1 MLJ 160 dan *Malayan Banking Bhd v International Tin Council and another appeal* [1989] 3 MLJ 286 diikuti.

(2) Kausa tindakan untuk tort fitnah telah dilakukan apabila penerbitan fitnah dibaca, dilihat atau didengar. Defendan keempat sebagai penulis rencana adalah bertanggungan untuk penerbitannya atas dasar prinsip penerbitan bersama dan/atau pengulangan yang diberi kuasa. Kausa tindakan berkenaan dengan defendan keempat timbul di Malaysia oleh kerana rencana tersebut ditulis olehnya dengan niat dan pengetahuan bahawa ia akan diterbitkan di Malaysia. Selanjutnya, defendan keempat tidak mencabar penegasan di dalam pernyataan tuntutan plaintif bahawa rencana yang ditulisnya telah diterbitkan di

A Malaysia dan bahawa beliau tahu dan berniat rencana tersebut diterbitkan di Malaysia (lihat ms 195G–H).]

Notes

For cases on jurisdiction of the High Court, see 2(2) *Mallal's Digest* B (4th Ed, 1999 Reissue) paras 3069–3070.
For cases on liable generally see 12 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 165–230.

Cases referred to

C *American Express Bank Ltd v Mohamed Toufic Al-Ozeir & Anor* [1995] 1 MLJ 160 (folld)
HRH Maharanee Seethadevi Gaekwar of Baroda v Wildenstein [1972] 2 QB 283 (refd)
Lee Teck Chee & Anor v Merrill Lynch International Bank Ltd [1998] 4 CLJ 188 (refd)
D *Malayan Banking Bhd v International Tin Council and another appeal* [1989] 3 MLJ 286 (folld)

Legislation referred to

Courts of Judicature Act 1964 ss 23(1)(a), (2), 24
E Rules of the High Court 1980 O 12 r 7(1)

Firoz Hussein (*Puthucheary Firoz & Asmet*) for the plaintiff.
Darryl Goon (*Raja, Darryl & Loh*) for the fourth defendant.

Rahmah Hussain J: On 11 December 1998 the learned senior assistant registrar dismissed the application to set aside the writ of summons against F the fourth defendant pursuant to O 12 r 7(1) Rules of the High Court 1980.

The fourth defendant submits that the basis of his application is that the court has no jurisdiction to try this proceeding against him.

The writ of summons dated 1 August 1998 was served on the fourth defendant whilst he was in Malaysia on 24 September 1998. It is argued on G behalf of the fourth defendant that the mere service of the writ on the fourth defendant in Malaysia does not automatically confer jurisdiction on the High Court of Malaya. Learned counsel also argued that the High Court of Malaya does not have civil jurisdiction to try this proceeding against him as it does not come within the ambit of ss 23(1), 23(2) or 24 of the Courts of H Judicature Act 1964 ('CJA').

It is further submitted that s 23(1)(a) of the CJA sets out a test on whether the cause of action has arisen within the local jurisdiction of the court. He says, it is clear from the statement of claim that the nature of the cause of action is libel which arises when an allegedly defamatory statement is published to a third party. Furthermore, s 23(1)(a) of the CJA does not I apply to the fourth defendant because the plaintiff has not pleaded that the publication of the allegedly defamatory article in *The TIME Magazine* containing the same was made by the fourth defendant within the local

jurisdiction of the High Court ie West Malaysia. Neither is there any evidence to show that the fourth defendant published the said article in West Malaysia. According to the fourth defendant, all he did was to write the article in question in Jakarta, Indonesia and to send a draft of it to Hong Kong.

To support his argument learned counsel for the fourth defendant referred to the case of *Lee Teck Chee & Anor v Merrill Lynch International Bank Ltd* [1998] 4 CLJ 188 wherein Kamalanathan Ratnam J held that:

> Since publication is vital to sustain a charge of defamation and since s 23(1)(a) of the CJA requires the 'cause of action' to have occurred in Malaysia, the plaintiffs must show publication within the jurisdiction in order to be able to maintain this claim in Malaysia.

On the other hand learned counsel for the plaintiff submits that in paras 4 and 5 of fourth defendant's affidavit affirmed on 9 October 1998 (encl 7), the fourth defendant admitted he was the author of an article entitled 'How Malaysia Throttles Dissent' which was published at p 26 of *The TIME Magazine* on 15 June 1998. The article was written by fourth defendant who intended its publication in Malaysia and elsewhere as stated at para 6(iii) of plaintiff's affidavit (encl 11A). This fact was not disputed by the fourth defendant. Learned counsel for the plaintiff continues by saying that this court has jurisdiction over the fourth defendant on the ground that the defendant was present within its jurisdiction when service was effected upon him. He cites the case of *HRH Maharanee Seethadevi Gaekwar of Baroda v Wildenstein* [1972] 2 QB 283 whereby Lord Denning MR (as his Lordship then was) stated (at p 292):

> If a defendant is properly served with a writ while he is in this country, albeit on a short visit, the plaintiff is prima facie entitled to continue the proceedings to the end. He has validly invoked the jurisdiction of the Queen's courts; and he is entitled to require those courts to proceed to adjudicate upon his claim.

Now the law in Malaysia in respect of jurisdiction over a defendant served with proceeding in Malaysia has been considered on several occasions by the Malaysian courts. In the case of *American Express Bank Ltd v Mohamed Toufic Al-Ozeir & Anor* [1995] 1 MLJ 160, Peh Swee Chin FCJ (as his Lordship then was) at p 166B–E stated:

> In a case like the present one, involving some foreign elements, the question that normally first of all arises, is whether our courts have jurisdiction, ie the power to deal with the case.
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> At common law, it would mean that a Malaysian court would have jurisdiction over a foreign defendant, if he is present in Malaysia. If he is not present in Malaysia, the Malaysian court would still have jurisdiction, if the foreign defendant has submitted to jurisdiction, ie he has submitted to being sued in Malaysia.
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> If neither such defendant can be served in this country, because he is not present here nor has he submitted to jurisdiction, then the Malaysian court can assume, statutorily, such jurisdiction over the foreign defendant under O 11 r 1 of the Rules of the High Court 1980 ('the RHC') as the conferment of such jurisdiction is implicit in connection with the granting of leave by the

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> High Court for service out of jurisdiction, etc. There is no need to go further in this case by referring to the relevant provisions of the Courts of Judicature Act 1964, etc for source or origin of such statutory jurisdiction.

The other case cited by learned counsel with regard to the issue of jurisdiction is *Malayan Banking Bhd v International Tin Council and another appeal* [1989] 3 MLJ 286, Mohamed Azmi SCJ (as his Lordship then was) stated at p 286G:

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> Service is not solely the foundation of our High Courts. Apart from O 11 r 1 of the Rules of the High Court 1980, s 23(1)(b) of the Courts of Judicature Act 1964 provides extra-territorial jurisdiction to the High Court in cases where foreigners overseas are sued as co-defendants with local residents.

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From the abovesaid statement it is thus clear that service is not the sole basis of jurisdiction and that statute has now conferred extra-territorial jurisdiction to the courts. Section 23(2) of the CJA, provides the legal basis for it. It provides as follows:

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> Without prejudice to the generality of sub-s (1) the High Court shall have such jurisdiction as was vested in it immediately prior to Malaysia Day and such other jurisdiction as may be vested in it by any written law in force within its local jurisdiction.

The approach of interpreting the CJA was laid down by Mohamed Azmi SCJ in the *Malayan Banking Bhd*'s case (at p 288H) which is:

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> In interpreting s 23(1)(b) of the Courts of Judicature Act, we must in general assume that the legislature knows the then existing state of the law on the jurisdiction of the High Courts under the Courts Ordinance 1948, and in construing an Act of Parliament where the words used by the legislature are precise and unambiguous, then the literal and strict construction rules should apply ... .

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Therefore by virtue of the foregoing, I agree with learned counsel for the plaintiff's submission that the position in respect of the High Court prior to Malaysia Day was that the service upon a defendant present in Malaysia was sufficient to confer jurisdiction on the High Court. After Malaysia Day, by virtue of s 23(2) of the CJA, the High Court continued to exercise its jurisdiction over those served with proceedings whilst they were in Malaysia even if their presence was temporary in nature.

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With regard to the argument by learned counsel for the fourth defendant, as to the place where the cause of action arose, the plaintiff submits that the tort of defamation is committed where the defamatory publication is read, seen or heard. The fourth defendant as the author of the article is thus liable for its publication on the basis of the principles of joint publication and/or authorised repetition. The cause of action in respect of the fourth defendant arose in Malaysia because the article was written by him with the intention and knowledge that it would be published in Malaysia.

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In support learned counsel for the plaintiff referred to 28 *Halsbury's Laws of England* (4th Ed, Reissue) at paras 32, 38, 68 and 73 where it was stated:

> The publisher — As a general rule the person to be sued as the defendant in an action of libel or slander, or to be prosecuted on an indictment for a libel, is he who published the defamatory statement or caused it to be published. Every person who participates in the publication may be liable as a publisher.
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> Joint and several liability — ... Thus, if a libel appears in a newspaper, the author of the libel and the proprietor, editor, printer, publisher and vendor of the newspaper are prima facie jointly and severally liable.
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> Responsibility of the writer of a libel for its publication — Although writing is not in itself publication, the writer of a libel must be taken to understand what he has written, and he ought to do all he can to prevent it being made known to a third person.
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> Liability of original publisher on republication — ... If a defendant requests another to publish defamatory matter, and gives him a written statement of it for that purpose, whether in full or in outline, and the agent publishes that matter adhering to the sense and substance of it, although the language is to some extent his own, the defendant is liable as the publisher. ... The test is whether or not the defendant authorised the repetition in a written form or it can be inferred from the surrounding circumstances that he anticipated and wished his words to be repeated in that form.

Now in this case the plaintiff has at paras 2 and 5 of the statement of claim pleaded that *The TIME Magazine* is a magazine which is published and distributed in Malaysia pursuant to a publication permit PP676/11/98 and that the article was published by the fourth defendant. The fourth defendant on the other hand did not challenge that the article written by him was published in Malaysia and that he knew and intended the article to be published in Malaysia.

Therefore based on the facts and the pleadings in this action, I was of the opinion that this court has jurisdiction over the fourth defendant. As such, I dismissed the appeal with costs.

Appeal dismissed with costs.

Reported by Chin En Tek